No. 22506

In the

United States Court of Appeals

For the Ninth Circuit

RUSSELL O. LAW,

Appellant,

vs.

JOINT CHECKER LABOR RELATIONS COMMITTEE, SAN FRANCISCO, an unincorporated association, PACIFIC MARITIME ASSOCIATION, an unincorporated association, ILWU, an unincorporated labor union, ILWU, LOCAL 34, an unincorporated labor union, MATSON TERMINALS INC., a California corporation

Appellees.

Brief of Pacific Maritime Association, other employer appellees, International Longshoremen's and Warehousemen's Union and other union appellees

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STATEMENT OF ISSUES

1. Is the employer's right to discharge an employe subject to any substantive limitations other than those set out in the collective bargaining contract and the National Labor Relations Act?

2. Does the law impose any regulations on the handling of a grievance by the exclusive collective bargaining representative, except those imposed by the National Labor Relations Act (including the duty of fair representation) and the collective bargaining contract?

3. Does the law impose any procedural regulations, such as the doctrine and rules of Constitutional *due process,* on the conduct of the joint union-employer committee acting in the grievance-arbitration machinery?

4. Can an employe obtain any relief in an action under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to set aside a final decision in the grievance-arbitration machinery of the collective bargaining contract, where the employe fails to show a breach of the duty of fair representation in the handling of the grievance leading to his discharge?

STATEMENT OF THE CASE

Prior to November of 1964, Russell Law worked from time to time as a casual ship clerk to perform extra ship clerk work (F.9).[1] This is work that is sometimes available when the regular permanent registered work force can not handle peaks in the work load (F.8). On November 23, 1964, Law worked for Matson Terminals, Inc. checking cargo being loaded on the *S.S. Dant.* On that date, he did his work so carelessly that the wrong cargo was loaded by the longshoremen who were doing their work in accordance with instructions Law relayed to them (F.11). The one and one-half hours time lost by this group of longshoremen during which the mistake was corrected, represented considerable and unnecessary expense (F.12).

As a result, Matson Terminals, Inc. filed a complaint against Law. (F.14). This complaint was filed pursuant to the grievance procedure of the collective bargaining contract between Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union. The first step of that procedure is investigation and adjudication of the complaint by the Joint Port Labor Relations Committee. Prior to consideration of the complaint in the

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1. The facts of this case are set out in the district court's detailed findings of fact which along with the court's conclusions of law are reprinted in the Appendix to this brief. Finding of fact is abbreviated by F. and conclusion of law is abbreviated by C.

grievance procedure, the union members of the joint committee discussed the matter with Law (F.18). He admitted to them that he had caused the wrong cargo to be loaded aboard the *S.S. Dant.* They told him that they would represent him as best they could (F.18e).

The Committee considered the complaint that afternoon, January 13, 1965 (F.21). The employers asserted that Law had failed to do his work properly. The union presented the factual material Law had given them. The Committee then decided the case. As is customary in the case of such negligent performance of work by nonregistered or casual clerks, the Committee denied Law further dispatch privileges (F.33). Based on their experience, the union representatives felt that they would have lost if they had attempted to take this decision to arbitration. (R.T. 111, 165-166)

The decision of the Committee exhausted the contractual grievance procedure except for claims that might be asserted under § 13 which provides:

> "There shall be no discrimination in connection with any action subject to the terms of this Agreement either in favor of or against any person because of membership or non-membership in the Union, activity for or against the Union or absence thereof, or race, creed, color, national origin or religious or political beliefs."

Law has expressly denied that he is asserting any violation of § 13 (F.36, 37; cf. Op. Br. p.55). The contract provides, accordingly, that the decision here involved is final and binding. On findings so stating (F.13, 15, 16, 26), the trial court so concluded (C. 8, 9).

Law filed his complaint in district court. After trial on the merits, the district court made its findings and conclusions as to, *inter alia,* the duty of fair representation. The union at all times acted "with honesty, fairness and impartiality" in handling the Law grievance (F.3, 7, 31). It "fairly, fully and accurately represented Law's interest at all times (F.28). It took all of its

actions regarding Law "in good faith and without any malice toward, or prejudice" against him (F.29) and presented the facts of the dispute "completely and accurately to the [Joint] Committee" (F.30., see also F.21). Law "was not the subject of any invidious or hostile discrimination" by any of the defendants (F.32). The district court concluded, on its findings, that there was "no violation of any duty of fair representation" owing to Law (C. 4, 5 and also c. 6, 7, 9) and that there was no violation of the contract (C. 2, 3). Thereafter the court entered judgment in favor of defendants (C.T. 359).

ARGUMENT

1. There is no basis for setting aside the trial court's findings that there has been no breach of the duty of fair representation.

Rule 52(a) of the Federal Rules of Civil Procedure provides in part:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Acceptance of this rule is so well settled that lengthy citation is not necessary. Some examples are: *United States v. Oregon State Medical Society,* 343 U.S. 326 (1952); *Reliance National Life Insurance Company v. Hackelman,* 372 F.2d 133 (9th Cir., 1967); and *Snider v. England,* 374 F.2d 717 (9th Cir., 1967). In a recent case, this Court stated the rule as follows (*Santa Anita Mfg. v. Lugash,* 369 F.2d 964 (9th Cir., 1966)):

> "At the outset we must consider the dimension of our function as a reviewing court. We are not a trial court and will not weigh the evidence de novo to arrive at new find-

> ings. Our power is limited to performing the function assigned to us by Rule 52(a) of the Federal Rules of Civil Procedure. Only if the findings of the court below are clearly erroneous can we set them aside."

Law's brief is an attempt to have this court consider the evidence *de novo*. His lengthy statement of facts is a summary of the evidence from his point of view, with references only to the transcript of the trial in the court below. He has ignored the court's findings of fact. He has utterly failed to meet his appellant's burden of showing that the findings of fact are "completely erroneous". There is ample evidence in the record to support the district court's findings of fact and particularly those related to the duty of fair representation (F. 27-32). They accordingly are binding in this Court. They fully support the conclusion (C. 4-9) that there was no breach of the duty of fair representation.

2. For an individual employe to prevail on a § 301 claim of violation of a collective bargaining contract, he must first prove that his union breached the duty of fair representation in processing his grievance.

The present case is controlled almost precisely by the principles of law in *Vaca v. Sipes,* 386 U. S. 171 (1967). In that case, an employe sued his union alleging that he had been discharged from his employment in violation of the collective bargaining contract between his employer and the union, and that the union had arbitrarily refused to take his grievance to arbitration. The Supreme Court agreed that the employe had stated a claim upon which relief could be granted, stating (386 U.S. at 185):

> ". . . [A] situation when the employee may seek judicial enforcement of his contractual rights arises if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, *and* if, as is alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance." (Emphasis in the original.)

The Supreme Court then referred to the award of the jury that the grievance had merit and should have resulted in a favorable decision. The Court stated (386 U.S. at 193):

> "Applying the proper standard of union liability to the facts of this case, we cannot uphold the jury's award, for we conclude that as a matter of federal law the evidence does not support a verdict that the Union breached its duty of fair representation. As we have stated, Owens could not have established a breach of that duty merely by convincing the jury that he was in fact fit for work in 1960; he must have also proved arbitrary or bad-faith conduct on the part of the Union in processing his grievance."

The court below applied these *Vaca* principles.

The principal issue before the district court was the same as the one the Supreme Court confronted in *Humphrey v. Moore,* 375 U.S. 335 (1964). The Supreme Court held that a final decision in the grievance-arbitration procedure will not be set aside by a court in the absence of a showing that the decision was obtained by improper conduct of the union in breach of its duty of fair representation. Such a showing must be further supported by establishing a violation of the collective bargaining contract before any effective relief can be provided.

Humphrey v. Moore, supra, involved two companies ("E & L" and "Dealers") that had operated in the same geographic area. They agreed to split the area between them and each agreed to retire from the other's now exclusive area and to this end, to transfer facilities back and forth. A dispute arose among the employes of the two employers as to who should be laid-off and who should continue to work.

The employes of both companies were represented by the same union and had similar or identical collective bargaining contracts. The contracts contained identical provisions regarding the employes' seniority rights. E & L was the older company, and its employes generally had greater seniority than those at Dealers; any

dovetailing of the seniority lists would mean a displacement of many of Dealers' employes. Both contracts also included an identical clause, § 5, regarding the resolution of disputes arising out of mergers or absorptions. The grievance procedure was also the same in both collective bargaining contracts. It provided for referral first to a local joint union-employers committee and, next, to a Joint Conference Committee in Detroit. The decision of the Joint Conference Committee was to be binding unless it could not agree on a decision. In that event, the dispute was to be submitted to arbitration.

The seniority dispute was referred to the local committee. It did not settle it. It was then referred to the Joint Conference Committee, where it was decided that the seniority lists be dovetailed. Many of Dealers' employes (including plaintiff Moore) lost their jobs under this decision.

Moore, acting for himself and all others in his situation, filed a complaint in the Kentucky state court seeking an order retaining Dealers' employes in their jobs. *There were allegations of a hostile, false, deceitful, conniving, dishonest breach of the duty of fair representation in the conduct of the grievance procedure before the Joint Conference Committee.* Moore alleged that the local union president had told Dealers' employes that they had nothing to worry about and had thus lulled them into a false sense of security. He contended that, as a result, they were denied the opportunity of making their contentions fully known to the Joint Conference Committee in its consideration of the grievance. He also alleged that the union president had purposely deadlocked the local committee in order to effect this discrimination against the Dealers' employes. There were further detailed allegations of "false and deceitful" action, of "connivance", and of "dishonest union conduct in breach of its duty of fair representation" in the Joint Conference Committee proceedings. There were allegations that the employes were deprived of a Joint Conference Committee

hearing by the acts of the local union president (1) in espousing the cause of rival group within the union after having deceitfully connived against plaintiffs and (2) in deceiving the Dealers employes by indicating that the union would support their cause in the grievance procedure. There were allegations of a violation of § 5 of the contract. The pleadings asserted that the decision of the Joint Conference Committee, which changed plaintiffs' seniority standing so that they would be discharged, was the result of an incorrect interpretation and application of the collective bargaining contract in that § 5 precluded dovetailing of seniority in these circumstances.

The Kentucky trial court denied the injunction sought by Moore, but the Kentucky Court of Appeals reversed and granted it. It held, in effect, that the Joint Conference Committee violated § 5 of the contract when it decided the grievance by ordering dovetailing of seniority on the ground that the change in the operation of the companies was not a merger or absorption that would give the Joint Conference Committee jurisdiction under § 5. On this basis, it held the administrative decision modifying the Dealers seniority list to be in violation of the contract. Certiorari was granted.

The Supreme Court majority opinion holds that judicial relief could be granted *if* the Joint Conference Committee had erred in changing seniority status so as to affect jobs, and *if* the change was arbitrary or capricious, and *if* the Joint Conference Committee procedure had been poisoned by the union's breach of its duty of representation in handling the seniority issue in the grievance proceeding at the Joint Conference Committee level. The Court held that Moore had sufficiently pleaded that his contract rights had been violated and had pleaded that this contract violation had occurred as a result of union activity in the administration of the grievance procedure that was *in breach of his right to and its duty of fair representation.* Therefore, the Court concluded, Moore

had standing to sue, the court was not bound by the Joint Conference Committee decision if Moore established the breach of the duty of fair representation pleaded, and the court could itself then determine whether the jurisdictional fact under § 5 of a merger or absorption had been established.

Humphrey states that a breach of the duty of fair representation by the union in the conduct of the grievance-arbitration machinery will allow the court to review a grievance-arbitration decision which the contract provides is final and binding. *Vaca* clarifies this ruling by holding that in the absence of proof of breach of the duty of fair representation, such grievance-arbitration action is final and binding. It adds that the proof of the contract violation does not establish a breach of the duty.

The substantive law applicable in § 301 contract violation cases is established by the opinions referred to above. A breach of the duty of fair representation must be shown. The findings in this case, that such breach was not shown, cannot be set aside. Unless the § 301 law is not applicable, the judgment below must necessarily be affirmed.

3. The governing law in this case is the federal common law of labor relations which is fashioned by the courts in § 301 cases.

Russell Law makes a number of arguments based upon the proposition that legal principles developed in other fields of the law should be binding in matters of labor relations even if they are disruptive to the ordinary course of collective bargaining. This proposition has repeatedly been denied by the Supreme Court. It is recognized that in § 301 cases the courts will apply the substantive federal law and that that is the federal "common law in this area of labor relations". See *Dowd Box Co. v. Courtney,* 368 U.S. 502, 507 and 514 (1962); *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 456 (1957).

Law contends that the decision of the Joint Port Labor Relations Committee should be set aside because the acts of the collective bargaining agent in determining who would participate on the union side of the Committee were not individually confirmed by him. He relies on a statement in a Corpus Juris. 685, Agency, § 342 (Op. Br. 48). This statement asserts that, when a principal delegates a power to an agent, that agent may not delegate it to someone else without approval of the principal. This is used to attack the provision of the collective bargaining agreement prescribing the personnel of the Joint Port Labor Relations Committee. Whether the applicable contract be the 1952 master agreement, or any one of the subsequent documents, the contractual provision establishing a Joint Port Labor Relations Committee is the same. It provides:

> "Each of said labor relations committees shall be comprised of three or more representatives designated by the Union and three or more representatives designated by the Employers."

Russell Law is represented by whomever the union designated as the members of the committee. It would be completely destructive of collective bargaining if each person in the collective bargaining unit had to ratify the designation by the union of the persons on each of the committees in order to permit the committee to act.[2]

Russell Law asks this Court to find, notwithstanding the findings of the court below, that the decision in the grievance-arbitration procedure was illegal because he did not have knowledge of the charges against him or notice of the hearing or an opportunity to appear and to defend himself. The district court has made findings

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2. The individual employe gains many advantages from having the collective bargaining representative. In exchange, as part of the bargain that is imposed by the National Labor Relations Act, 29 U.S.C. § § 151, *et seq.*, the individual gives up the right to make his own contract and is bound by the contract made by the representative. The individual in the bargaining unit is not a principal who individually controls the actions of the representative. See *J. I. Case Company v. Labor Board,* 321 U.S. 332 (1944).

of fact (App. 4) that Law did have knowledge of the charges and notice of the hearing and an opportunity to appear and explain his position to the union representatives on the Committee. It is true, however, that he did not appear on his own behalf at the joint committee and that the explanation that he presented to his union representatives was presented by them before the full committee. Nowhere, however, has Law cited authority—either statutory or judicial—that supports his right to appear personally before the grievance committee or otherwise to receive notices and be treated independently of his bargaining representative. Nor has Law shown that failure to accord him these rights amounted to a breach of the duty of fair representation.

The fact that Law was not present at the Joint Committee's meeting did not amount to a breach of the duty of fair representation. Law had previously met with the union representatives on the committee. He had had the charges read to him. He said he understood the charges and that they were true. He offered in explanation various extenuating circumstances. His union representatives told him that they would do as best they could before the committee. In the full Joint Committee meeting, the union representatives presented Law's position faithfully as he had reported it to them (R. T. 31-32, 48-50, 60-67). There is nothing in the record to indicate otherwise. The findings are clear (See App. 5-6).

The employer representatives refused to accept Law's extenuating circumstances as a basis for making an exception to the usual decision on similar cases. Faced with an adamant position on the part of the employers and based on their knowledge as experienced labor representatives that they could not win an arbitration the union representatives agreed that Law would have to be barred from future dispatches (R. T. 110-111). There is no showing of hostile discrimination toward Law or lack of good faith on the part of his union representatives. The findings are clear (App. 6).

In regard to Law's claims of insufficiency of notice of the hearing, he has again failed to make out a case of breach of the duty of fair representation. It is true that a written notice of the committee meeting, which was mailed to him in advance of the date set for the meeting, did not reach him because he had moved and had not given the union his new address. However, Law received oral notice of the afternoon Committee meeting during the morning. Most significant, he did, in fact, meet that morning with his union representatives. At that time they asked him whether he wanted a delay in the Committee meeting since he had not received the earlier letter. He declined this offer (R. T. 95, 107, 136). There is nothing in the record even suggesting hostile discrimination against Law or any bad faith in handling his case. The findings and conclusions of the court below that there was no arbitrary discriminatory or bad faith conduct on the part of the union (App. 6) should be sustained.

The federal common law as to judicial consideration of final decisions in the grievance-arbitration procedure of collective bargaining contracts is established. In general the courts will not review the merits of a decision that the contract says is final and binding because it is a decision by joint action of the employer and the union or because it is an arbitration award. *General Drivers Union v. Riss & Co.,* 372 U.S. 517 (1963). This principle governs § 301 actions unless the collective bargaining representative's conduct of the grievance-arbitration procedure is in breach of the representative's duty of fair representation. When the court has been shown that such conduct has taken place, it will then determine whether or not there has been a violation of the collective bargaining contract by the grievance-arbitration decision. See the discussion, above, of *Humphrey v. Moore,* 375 U.S. 335 (1964) and *Vaca v. Sipes,* 386 U.S. 171 (1967).

Russell Law finally contends that the doctrine of due process, which the Constitution applies to federal and state actions, also is governing in matters of labor relations (Op. Br. 35). The

failure to supply any citations in support of this proposition is to be expected. This is again an effort to avoid the ordinary application of the labor relations law under § 301.

Here, Law relies on the collective bargaining contract as a limitation on the employer's otherwise unrestricted power to discharge him at will. To enforce this substantive provision of the contract, he is obliged to use the contract's agreed upon procedure for enforcement. The bargain is for use of the grievance-arbitration procedure; Law is bound by this bargain. The bargain does not provide for the application of Constitutional *due process* rules or doctrines to the procedures of the grievance-arbitration committees.

Russell Law must look beyond the contract, to the general law, for limitations on actions of any members of the joint Committee. The only limitation is the duty of fair representation that is applicable in § 301 suits. It applies to the union members of the committee. It arises out of the peculiar status that federal law gives to the exclusive representative for collective bargaining. The duty is "derived not from the collective bargaining contract but implied from the union's rights and responsibilities conferred by federal labor statutes". See *Humphrey v. Moore,* 375 U.S. 335, 356 (1964).

The duty of fair representation, applicable to the union members of the grievance committee, does not make the rules and doctrines of Constitutional *due process* applicable to the joint committee's procedures. Were this proposition not obviously correct, the nature of labor relations would explain its validity. The grievance-arbitration procedure is voluntarily accepted by the employer and the employes, acting through their exclusive bargaining representative. The process provides a "substitute for industrial strife" and is "part and parcel of the collective bargaining process itself". See *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578 (1960). The grievance committee provides a proper place for the settlement of grievances.

". . . [A] union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration.

". . . [T]he union's statutory duty of fair representation protects the individual employee from arbitrary abuses of the settlement device. . . .

* * *

"In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances." See *Vaca v. Sipes,* 386 U.S. 171, 192-194 (1967).

The underlying principle had earlier been stated in *Ford Motor Co. v. Huffman,* 345 U.S. 330, 337-338 (1953). The bargaining representative's spokesmen may exercise "a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented". This principle was re-stated in *Humphrey v. Moore,* 375 U.S. 335, 349 (1964):

"[W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. . . . [A] union must be free to sift out wholly frivolous grievances which would only clog the grievance process. . . ."

The application of this principle to a situation like that now before this Court was more fully stated in the concurring opinion of Mr. Justice Douglas, who said, 375 U. S. at 358-359:

"[I]n this Court's fashioning of a federal law of collective bargaining, it is of the utmost importance that the law reflect the realities of industrial life and the nature of the collective bargaining process. We should not assume that doctrines evolved in other contexts will be equally well

adapted to the collective bargaining process. Of course, we must protect the rights of the individual. It must not be forgotten, however, that many individual rights, such as the seniority rights involved in this case, in fact arise from the concerted exercise of the right to bargain collectively. Consequently, the understandable desire to protect the individual should not emasculate the right to bargain by placing undue restraints upon the contracting parties. Similarly, in safeguarding the individual against the misconduct of the bargaining agent, we must recognize that the employer's interests are inevitably involved whenever the labor contract is set aside in order to vindicate the individual's right against the union. The employer's interest should not be lightly denied where there are other remedies available to insure that a union will respect the rights of its constituents. *Nor should trial-type hearing standards or conceptions of vested contractual rights be applied so as to hinder the employer and the union in their joint endeavor to adapt the collective bargaining relationship to the exigencies of economic life.*" (The emphasis is added.)

The district court, following the lead of the *Humphrey* decision, properly held that Russell Law could not prevail in this law suit under § 301 because he did not establish a breach of the duty of fair representation.

There have been other attempts to apply general law that is at variance with labor relations law in § 301 suits. An argument was made before the Supreme Court that cases arising under the Federal Arbitration Act, 9 U.S.C. §§ 1-14, would set forth the law applicable in a § 301 suit with respect to either enforcement or setting aside an arbitration award. The court rejected this proposition in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). The court states at 578:

"Thus the run of arbitration cases, illustrated by Wilko v. Swan, 346 U.S. 427, [98 L.ed. 168, 74 S.Ct. 182,] becomes irrelevant to our problem. There the choice is between the adjudication of cases or controversies in courts with estab-

lished procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." (363 U.S. 574 at 578.)

The cases we have cited establish that the § 301 substantive law governs in a case like the one presented on this appeal. True, the courts are called upon to fashion that law on a case by case basis. However, it is clearly error to apply principles of the general law that are not harmonious to the national labor policy. Law's contentions as to what is the § 301 law must be rejected.

4. Law raises issues that are within the exclusive jurisdiction of the National Labor Relations Board.

In Section III of his opening brief, Law asserts claims of violations of the National Labor Relations Act. Excerpts from his brief in which these claims are stated are re-printed in the Appendix hereto. These claims are within the exclusive jurisdiction of the National Labor Relations Board.

The NLRB has primary jurisdiction to hear all charges that assert, even arguably, unfair labor practices as defined in §§ 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158. The statutory jurisdiction of the Board is exclusive and pre-empting. The leading case defining this doctrine of pre-emption is *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 244-245 (1959). The *Garmon* rule has been applied consistently by the United States Supreme Court. *Plumbers, Steamfitters, etc. v. County of Door,* 359 U.S. 354 (1959); *Marine*

Engineers Beneficial Association v. Interlake S.S. Co., 370 U.S. 173, 174, 176-177 (1962); *International Association of Bridge, etc. Workers v. Perko,* 373 U.S. 701, 706 (1963); *Hattiesburg Building & Trades Council v. Broome,* 377 U.S. 126, 127 (1964).

The Supreme Court in *San Diego Building Trades Council v. Garmon,* supra, 359 U.S. 236, 240-243 (1959), discusses at length the expertise of the Labor Board and its exclusive jurisdiction. It then quotes from *Garner v. Teamsters, C & H Union,* 346 U.S. 485, 490-491 (1953), on the role of the Labor Board in administering the National Labor Relations Act:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. . . ."

The federal courts do not provide remedies for claims that arguably assert unfair labor practices.

CONCLUSION

Russell Law seeks reversal of the judgment of the district court. That judgment was entered after trial on the merits and is supported by findings of fact and conclusions of law. Law has not directly attacked the findings of fact; he has not shown that they

are "clearly erroneous". The district court applied the federal common law in the area of labor relations that courts have fashioned under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. It properly rejected Law's claims of procedural rights in the processing of his grievance.

We respectfully ask that the judgment of the district court be affirmed.

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August 15, 1968

Appendix

Original filed Oct 31 1967
Clerk, U.S. Dist. Court, San Francisco

In the United States District Court for the Northern District of California

No. 43719

RUSSELL O. LAW,
Plaintiff,

vs.

JOINT CHECKER LABOR RELATIONS COMMITTEE, SAN FRANCISCO, an unincorporated association, PACIFIC MARITIME ASSOCIATION, an unincorporated association, ILWU, an uincorporated labor union, ILWU, LOCAL 34, an unincorporated labor union, MATSON TERMINALS INC., a California corporation,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial and the Court, having duly considered the evidence and being fully advised in the premises, now finds the following:

FINDINGS OF FACT

1. Defendant Pacific Maritime Association (hereinafter referred to as "PMA") is a duly organized and existing California nonprofit corporation with a usual place of business at San Francisco, California. PMA represents its member steamship, stevedoring and terminal companies for the purpose of negotiating and administering collective bargaining contracts with unions, representing employes of its member companies. The companies so represented by PMA are engaged in commerce as defined in the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 142; see 29 U.S.C. § 152(6).

2. Defendant International Longshoremen's and Warehousemen's Union (hereinafter referred to as "ILWU") is a duly organized and existing unincorporated labor organization within the meaning of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 142; see 29 U.S.C. § 152(5). The ILWU is the exclusive collective bargaining representative of longshoremen and ship clerks employed by PMA in Pacific Coast ports, including, inter alia, San Francisco and Oakland, California.

3. Defendant ILWU, Local 34 (hereinafter referred to as "Local 34") is one of several member locals of defendant ILWU. Local 34 is located in San Francisco, California, and its members include individuals employed as ship clerks in San Francisco and Oakland.

4. Defendant Matson Terminals, Inc. (hereinafter referred to as "Matson") is a California corporation engaged in the stevedoring industry on the Pacific Coast and is a member of PMA. Ship clerks are employed by defendant Matson in, inter alia, San Francisco and Oakland.

5. Defendant Joint Checker Labor Relations Committee, San Francisco (hereinafter referred to as the "Committee") is an unincorporated committee established and existing pursuant to the terms of a collective bargaining contract between defendant PMA, on behalf of its members, and defendant ILWU, on behalf of itself and on behalf of each of its ship clerk local unions (hereafter the Agreement). The membership of the Committee consists of representatives of defendant PMA and of defendant ILWU.

6. Under the terms of the Agreement, the Committee maintains and operates joint dispatching halls in, inter alia, Oakland for the dispatching of ship clerks to perform work for employer members of defendant PMA.

7. Under the terms of the Agreement, the Committee investigates and adjudicates complaints against ship clerks by employers.

8. Ship clerks working under the Agreement are in one of three categories: they are fully registered (Class A) ship clerks, or ship clerks with limited (Class B) registration, or casual ("social security") ship clerks having no registered status. First preference in employment and dispatch is given to Class A ship clerks who are available for employment. Second preference in employment and dispatch is given to Class B ship clerks who are available for employment. Casual ship clerks are not dispatched from the dispatching hall or employed while there is any registered ship clerk qualified, ready and willing to do the work.

9. For some time prior to January 13, 1965, plaintiff Russell O. Law worked as a casual ship clerk in San Francisco on a day-by-day basis.

10. Shortly before 7:30 a.m. on November 23, 1964, plaintiff Law arrived at the dispatch hall in Oakland and was dispatched shortly thereafter to work for defendant Matson as a hatch clerk on the S.S. DANT.

11. On November 23, 1964, plaintiff Law, while so employed by defendant Matson as a hatch clerk, allowed certain cargo destined for Yokosuka, Japan, to be loaded with cargo on the S.S. DANT, which was destined for Subic Bay in the Philippine Islands.

12. Plaintiff's error, as described in Finding 11, resulted in one and one-half hour's lost time for the ship gang and represented expense to defendant Matson that was unnecessary and that was considerable in amount.

13. The Agreement at all relevant times required that complaints be processed in accordance with the grievance-arbitration procedure set forth therein. In the San Francisco area (including Oakland) if a dispute arising on the job is not settled on the job it is referred to the Committee. If the employer's representation on the Committee and the union's representation on the Committee disagree on any question before the Committee, either

the employers or the union may refer the question to the next procedural step in the grievance-arbitration machinery. Agreement by the parties at the level of the Joint Checker Labor Relations Committee, however, is a final and binding determination of any dispute arising on the job.

14. Defendant Matson, in accordance with the terms of the Agreement, lodged a complaint against plaintiff with defendant Committee charging that plaintiff was negligent in his work while employed by defendant Matson on November 23, 1964.

15. The complaint by Matson related to a dispute arising on the job.

16. Plaintiff at no time effectively claimed that the dispute was anything except a dispute arising on the job.

17. Defendant Committee determined to consider the Matson complaint against plaintiff at a meeting on January 13, 1965. A notice of the meeting was mailed to plaintiff by defendant Local 34, but it was not received by plaintiff as he had changed his residence.

18. Plaintiff Law was given verbal notice of the said meeting on the morning of January 13, 1965, and on the said morning plaintiff met with union representatives serving on defendant Committee. At the said meeting:

(a) The complaint of defendant Matson against plaintiff was read to plaintiff;

(b) Plaintiff heard the contents of the said complaint;

(c) Plaintiff understood the contents of the said complaint;

(d) Plaintiff admitted that the allegations of the complaint were factually correct;

(e) The union representatives told plaintiff that they would represent him as best they could before the Committee;

(f) The union representatives told plaintiff that they had sufficient time to present his side of the case and that they needed no more time to do so.

19. The evidence, including the oral testimony, presented by defendants with respect to Finding 18, and its sub-findings, was credible, plausible and direct and was entitled to be credited by the trier of fact, and was credited by the trier of fact.

20. The evidence, including the oral testimony, presented by plaintiff with respect to Finding 18, and its sub-findings, was not credible, was not plausible and was not direct, and was not entitled to be credited by the trier of fact, and was not credited by the trier of fact.

21. The Committee met on the afternoon of January 13, 1965, and union representatives of the Committee presented to the Committee the factual information that plaintiff Law had given at the meeting referred to in Finding 17.

22. At their meeting on the afternoon of January 13, 1965, the Committee considered defendant Matson's complaint against plaintiff, determined that plaintiff had performed his work negligently while employed by defendant Matson on November 23, 1964, and on the basis of this determination the Committee ordered that plaintiff be denied further dispatch. In effect, this order meant that plaintiff was no longer eligible to work as a ship clerk in the San Francisco area.

23. The allegations made by defendant Matson in its complaint against plaintiff, based on the events of November 23, 1964, are true.

24. Plaintiff's testimony at the trial sufficiently supports the Court's finding that the allegations made by defendant Matson in its complaint are true.

25. Evidence, including oral testimony, presented by defendants sufficiently supports the Court's finding that the allegations made by defendant Matson in its complaint are true. Said evidence was credible, plausible and direct and was entitled to be credited by the trier of fact, and was credited by the trier of fact.

26. The determination of the Committee is now a final and binding determination in the grievance-arbitration procedure with respect to the matters alleged by plaintiff in his complaint herein; the Court has no basis, in fact, for setting aside or modifying that determination.

27. At all relevant times defendant ILWU and defendant Local 34 acted with honesty, fairness and impartiality in all matters related to the Matson complaint against plaintiff.

28. At all relevant times, defendant ILWU and defendant Local 34 fairly, fully and accurately represented plaintiff's interests with respect to all matters related to the Matson complaint against plaintiff and with respect to any and all rights of plaintiff under the Agreement.

29. All actions of the members of the Committee, with respect to the Matson complaint against plaintiff and with respect to any and all rights of plaintiff under the Agreement, were taken in good faith and without any malice toward, or prejudice against plaintiff.

30. Defendants ILWU and Local 34 presented plaintiff's side of the dispute completely and accurately to the Committee.

31. The Committee acted with honesty, fairness and impartiality in considering and acting upon the Matson complaint against plaintiff.

32. Plaintiff was not the subject of any invidious or hostile discrimination by any defendant herein.

33. The Committee issued its order denying plaintiff further dispatch as a ship clerk because of plaintiff's negligent performance of duties; the said order was consistent with the customary practice of the Committee in cases presenting identical or similar facts. Evidence, including oral testimony, presented by defendants to this effect was credible, plausible and direct and was entitled to be credited, and was credited, by the trier of fact.

34. The Committee by letter dated February 12, 1965, advised plaintiff and his attorney fully of the right of plaintiff to invoke grievance-arbitration procedures if plaintiff believed that § 13 of the basic collective bargaining contract document had been violated; a copy of the said § 13 was sent plaintiff and to his attorney.

35. Section 13 of the basic collective bargaining contract states:

> "There shall be no discrimination in connection with any action subject to the terms of this Agreement either in favor of or against any person because of membership or non-membership in the Union, activity for or against the Union or absence thereof, or race, creed, color, national origin or religious or political beliefs."

36. At no time has plaintiff effectively invoked the grievance procedures related to § 13.

37. Plaintiff's claim herein does not allege discrimination or violation of the said § 13.

CONCLUSIONS OF LAW

Whereupon, the Court concludes as a matter of law:

1. The Court has jurisdiction of the parties and the subject matter herein.

2. The acts of defendants, or any of them, in all matters related to the complaint of defendant Matson against plaintiff, constituted no violation of plaintiff's rights under any provision of the Agreement or under any provision of any other contract.

3. The acts of defendants, or any of them, in all matters related to the conduct of grievance-arbitration procedures of the Agreement, constituted no violation of plaintiff's rights under any provision of the Agreement or under any provision of any other contract.

4. The acts of defendants, or any of them, in all matters related to the complaint of defendant Matson against plaintiff,

constituted no violation of any duty of fair representation owing to plaintiff by any defendant herein.

5. The acts of defendants, or any of them, in all matters related to the conduct of grievance-arbitration procedures of the Agreement, constituted no violation of any duty of fair representation owing to plaintiff by any defendant herein.

6. The acts of defendants, or any of them, in all matters related to the complaint of defendant Matson against plaintiff, constituted no violation of any statutory duty owing to plaintiff by any defendant herein.

7. The acts of defendants, or any of them, in all matters related to the conduct of the grievance-arbitration procedures of the Agreement, constituted no violation of any statutory duty owing to plaintiff by any defendant herein.

8. The determination of the Committee with respect to the complaint of defendant Matson against plaintiff is a final, binding and lawful decision of the collective bargaining grievance-arbitration process specified in the Agreement and is enforceable in the courts.

9. There is no basis in fact or in law for this Court, or any court, to set aside or modify the decision of the Committee with respect to the complaint of defendant Matson against plaintiff or with respect to plaintiff's rights under the Agreement or with respect to any matters that are the subject of the said determination.

10. Plaintiff has not presented sufficient evidence to sustain his burden of proof as to his purported claims presented in his complaint herein or in the pre-trial order herein.

11. Plaintiff is not entitled to any of the relief sought herein.

12. Defendants are entitled to judgment with costs.

Let judgment be entered accordingly.

Dated:

OLIVER J. CARTER
United States District Judge

Portions of Russell Law's brief claiming unfair labor practices.

The National Labor Relations Act section defining unfair labor practices requires the reduction to writing of any agreement when demanded by either party. We have in the case at bar in Ex. 1, an express provision that that writing can be changed only by a subsequent writing. We believe this is a sufficient demand under this statute to require any changes to be reduced to writing. (page 50).

* * *

The record in this case shows by the testimony of the defendants' own witnesses that this means "book men" as distinguished from those such as Law who are not union men and are sometimes referred to as "social security men" (which arises from the employment records of the employee not bearing a registration number but the employee's social security number).

The same practice condemned and found illegal by the administrative agency and by this court has thus not only been carried over but is carried into effect by use of the designation of "registration". (page 54)

* * *

Certainly there was no contention that he was properly notified or that he had an opportunity to appear or defend himself or indeed that any person or entity other than the defendant ILWU who had not theretofore had any part of the proceedings, was the exclusive collective statutory bargaining agent and the contention that under a section of the NLRB he had a right to talk to his accuser, a corporation, the defendant Matson Terminals. (page 56)

* * *

We should point out that under the disclosed contract, Ex. 1, the registration was confined solely to "book members" and synonymous with that. We should point out that under the disclosed contract a registration can only be given with the mutual consent of the employers association and the union, and the union has throughout refused to give its consent to this registration without the employee being a "full book" man of the union, Local 34, and the ILWU and then only to a portion of the group required to fill

these jobs. This matter has been raised collaterally when the NLRB has been asked to hold an election to certify a statutory collective bargaining representative as in *Phoenix Tin Ware Co., Inc.* (1952) 100 NLRB 528, where the contract provided that no tinsmith, welder, etc. should be employed unless "recognized by the union". In the *Phoenix Tin Ware case,* the NLRB held that since "recognition" was not defined in the contract, and gave the union a veto on employment of any employee, this provision in the contract was invalid, so the Board could not hold an election for want of a valid bargaining agreement. The *Phoenix case,* 100 NLRB 528, turns on and follows *Newton Investigation Bureau,* (1951) 93 NLRB 157, also a decision involving the question as to whether there should be an employee election called. This in turn required a determination as to whether there was a valid collective bargaining agreement, as the agreement in effect had a clause that when the employer filled a vacancy or created a new position, he could choose his own employees, "however, such person employed are satisfactory to both parties to this agreement". No limit was placed on the grounds of the union's discretion. The decision held that this contract provision as to requiring union approval for hiring was beyond the intent of the union security provisions of *Section 8 (a) (3)* of the Act. Obviously, then the provisions as to registration in the Master Agreement 1952 (Ex. 1) is to be measured by the same test and will fall by the same provision. (pages 56-57)

* * *

The evidence shows that there is two rules to apply, one to union members accused by an employer, and the other to non-union employees such as Law. There are separate procedures and separate penalties. As such, it is clearly a violation of law. (page 58)